IN THE

Supreme Court of the United States

October Term, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,
Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR RESPONDENTS IN OPPOSITION

William J. Janklow
Attorney General
State of South Dakota
Capitol Building
Pierre, South Dakota 57501

William F. Day, Jr.
Attorney for the Four Counties
Fifth and Main Street
Winner, South Dakota 57580

Tom D. Tobin
Special Assistant Attorney General
422 Main Street
Winner, South Dakota 57580

Attorneys for Respondents

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INTRODUCTORY STATEMENT

By order of January 12, 1976, this Court invited the Solicitor General to express the views of the United States in the above-entitled case. Four months later, on April 17, 1976, the Solicitor General, as *amicus curiae*, submitted a 22-page Memorandum in support of the position of Petitioner. This Brief is respectfully submitted in response to certain arguments in the Memorandum for the United States that Respondents deem worthy of the special attention of this Court.

Because of the paramount importance of certain provisions of the General Allotment Act of 1887, 24 Stat. 388, discussed herein, the following preliminary observations are appropriate. Section 5 of the General Allotment Act was the controlling provision of the General Allotment Act cited and analyzed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Both in *DeCoteau* and below, Section 5 served as the basis for certain surplus land cessions or sales approved and enacted in special statutes by Congress. If the language, legislative history and surrounding circumstances of any one of these special statutes enacted pursuant to Section 5 makes clear that Congress intended to disestablish a distinct portion of the reservation affected, then this Court has held in such a situation that:

> exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c). *See, United States v. Pelican*, 232 U.S. 442. *DeCoteau, supra* at 446-447.

In *Beardslee v. United States*, 387 F.2d 280 (C.A. 8, 1967), 18 U.S.C. § 1151(c) was also found to be applicable to the areas affected by the *Rosebud* Acts. *Beardslee, supra* at 287.

Distinguishable from this situation is the alienation of the Indian land base through other sections of the General Allotment Act. In many reservations the issuance of allotments and eventual patents in fee to individual members of the tribes pursuant to these other sections of the General Allotment Act soon resulted in a checkerboard problem. Moreover, the "citizenship" and the "subject to the laws of the state and territory" provisions of Section 6 of the General Allotment Act further complicated this checkerboard problem. In response, in 1948 Congress enacted 18 U.S.C. § 1151(a). Since neither the issuance of the patents in fee nor the "citizenship" and "subject to the laws" provisions of Section 6 of the General Allotment Act actually disestablished any reservation boundaries, the new definition of Indian

Country set forth therein solved the problem. Respondents do not question this fact. Nor do Respondents question that in this respect, the General Allotment Act never operated to disestablish any reservation or transfer any jurisdiction to any state. However, as *DeCoteau* attests, appropriate congressional action under Section 5 of the General Allotment Act most certainly accomplished this objective.

The United States in *DeCoteau* sought to confuse the two distinguishable situations and capitalize on the checkerboard problem that Congress corrected in 1948 by enacting 18 U.S.C. §1151(a) . Memorandum for the United States as *Amicus Curiae* at 5 (U.S.S.C., 1974), Brief for United States as *Amicus Curiae* at 11, 17,29 (U.S.S.C., 1974).[1] However, this Court recognized the distinction and rejected the position of the United States. In the instant case, the United States again seeks to confuse the two situations. M.U.S. at 10. The Rosebud Acts are within the purview of the *DeCoteau* distinction: namely, Section 5 of the General Allotment Act of 1887. Moreover, the language, legislative history and surrounding circumstances of the Rosebud Act makes *Rosebud* even clearer than *DeCoteau* in terms of congressional intent. The Rosebud Acts do not represent a purported disestablishment via allotments or other "subject to the laws" provisions of Section 6 of the General Allotment Act.

Of course, in *Rosebud* as in *DeCoteau*, there is also some limited checkerboard jurisdiction in the areas of the original Reservations affected by the Acts — approximately 15 percent of the land is still held in trust in both areas. *DeCoteau, supra* at 428. But these areas are not the problem areas Congress addressed in 1948 by enacting 18 U.S.C. §1151(a). They were not then within the boundaries of any reservation. Moreover, the limited checkerboard jurisdiction therein was not then nor is it now a question of legitimate concern.

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[1] Hereinafter cited as M.U.S. and B.U.S.

Unlike *DeCoteau*, however, in *Rosebud* one part of the original Rosebud Reservation was never affected by any special statute enacted pursuant to Section 5 of the General Allotment Act. As such it was plagued by the problems of the patents in fee and Section 6 of the General Allotment Act discussed *supra*. This is Todd County — the diminished Rosebud Reservation. In 1948 Congress solved the problem in Todd County by enacting 18 U.S.C. § 1151(a). The status of Todd County and this aspect of the General Allotment Act is not in issue here. It is the Rosebud Reservation.[4]

ARGUMENT

I

THE INCONSISTENT POSTURE OF THE UNITED STATES BELIES THE MERITS OF ITS PRESENT ASSERTION.

A cursory examination of the briefs and memoranda that the United States has filed in this and other similar cases within the last three years is in many respects instructive. At the outset, it is evident that the posture of the United States has shifted with the signs of the times. Prior to the decision of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the same individuals primarily responsible for the Memorandum in the instant case took the position in the Eighth Circuit Court of Appeals that the 1891 *DeCoteau* Act was "identical in effect to the three Acts in controversy here."

[4] With respect to the other counties that are in issue in the instant case, the decision below simply maintains the status quo. These counties have not been considered to be within the boundaries of the original Rosebud Reservation since the passage of the Rosebud Acts. *Rosebud, supra* at 1083, *Rosebud, supra* at 89. As the Supreme Court of South Dakota noted in a recent case that presented the question of whether that portion of the original Rosebud Reservation situated in Tripp County was disestablished by the 1907 Rosebud Act: "The State of South Dakota has exercised criminal and civil jurisdiction over the years *with the full acquiescence of all responsible federal authorities*. State v. White Horse, *231 N.W.2d 847* (S.D. 1975). Less than 10% of the resident population is enrolled in the Rosebud Sioux Tribe.

B.U.S. at 38 (C.A. 8, 1974). In general, the purported philosophy of the General Allotment Act was designated as the fundamental basis for the position of the United States:

> The Acts of 1904, 1907 and 1910 affecting the Rosebud Sioux Reservation are only three of the many Acts which between *1887* and *1913* opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians. These special Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. B.U.S. at 35 (C.A. 8, 1974) (emphasis added).

Before this Court in *DeCoteau*, the position of the United States still remained essentially the same in this respect. Both forms of the statutes, the 1891 *DeCoteau* Act and the Rosebud Acts in general, were a part of the same overall congressional plan. In urging this Court to grant certiorari and reverse the decision of the Supreme Court of the State of South Dakota it was stated that:

> We agree with the decision of the United States Court of Appeals for the Eighth Circuit in *United States ex rel. Feather v. Erickson*, 489 F. 2d 99, petition for a writ of certiorari pending, No. 73-1500 (Pet. App. D), that the effect of the 1892 [1891] Act was not to change the reservation boundaries but to permit homesteading of "surplus" lands within the Reservation in accordance with the *General Allotment Act*. . . .
>
> Both forms of statute, with some variations in wording, were repeatedly used in opening reservations under the General Allotment Act. The earlier statutes tended to be written in terms of sale of un-

> allotted land to the government for homestead purposes, while the later statutes often spoke of ceding unalloted land in trust to the government for homestead purposes.' Note 3. These are only two of the techniques employed by the government *within* Indian reservations. They may be contrasted with statutes terminating reservations, or changing or diminishing their boundaries. . . .
>
> There is no reason to believe that Congress, in choosing conveyance of 'surplus' land to the United States to be conveyed only to homesteaders, rather than having the United States act specifically as trustee for the Tribe in conveying such lands to homesteaders, intended to alter the reservation boundaries . . . M.U.S. at 4-5, 6, 8 (U.S.S.C., 1974) (emphasis added).

In the brief on the merits in *DeCoteau* the Solicitor General reiterated:

> It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson*, that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation. . . .
>
> The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands. . . .
>
> Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. . . .
>
> THE REFERENCES TO THE GENERAL ALLOTMENT ACT SHOW THE RESERVATION WAS MAINTAINED. Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. . . .

> In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within the reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question. . . .
>
> THE PAYMENT ARRANGEMENT OF THE ACT DID NOT CHANGE THE RESERVATION BOUNDARIES . . . The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold.
>
> Consequently, payment in this manner is *not* a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment any more than would a scheme of payment as individual lots are sold to homesteaders. *In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation.* B.U.S. at 9, 13, 14, 15, 16, 17, 19, 20 (U.S.S.C., 1974) (emphasis added).

At oral argument, the position of the United States was again made clear. The General Allotment Act of 1887 marked a departure in terms of a continued congressional policy that had formerly disestablished reservations. This was the focal point of the position of the United States. The fact that in *DeCoteau* payment was provided by a sum-certain-in-trust arrangement was not deemed by the United States to be of any significance whatsoever.

After this Court in *DeCoteau* rejected the United States' view of Section 5 of the General Allotment Act and the *DeCoteau* opinion undermined the crux of the position of the United States, the United States departed from its previous position. As a result of this departure, the same counsel for the United States is again before the Court in the instant case, but the Act in *DeCoteau* is no longer "identical in effect to the three Acts in controversy here." B.U.S. at 38, (C. A. 8, 1974). There is now a "crucial difference." M.U.S. at 13. It is the uncertain-sum-in-trust manner of payment present in *Rosebud* — although the United States in *DeCoteau* did not deem "payment" in any "manner" to be a "reliable indication of an intent by Congress" with respect to the issue of disestablishment. B.U.S. at 20 (U.S.S.C., 1974).

Moreover, although the three Rosebud Acts are even more irrevocably intertwined with Section 5 of the General Allotment Act, Section 5 no longer has anything to do with the basic issue to be resolved. Indeed, the Memorandum does not even bother to cite the very Act which until *DeCoteau* constituted, in terms of congressional continuity, the crux of the entire argument of the United States.

According to the United States, the focal point of attention should now only encompass the uncertain-sum-in-trust arrangement which in *Rosebud* Congress adopted between 1902 and 1904 — the "crucial difference." Ironically, even in this respect, the Memorandum does not cite a single Rosebud document to support this argument. For support, rather than addressing the thrust of the *DeCoteau* opinion with respect to Section 5 of the General Allotment Act of 1887 or the documentation or rationale of the opinions below, the United States, as in *DeCoteau*, argues blindly for a recognition of the end result of what was only a minor part of the fact situation in *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973). Although Respondents submit that here, as in *DeCoteau*, the position of the United

States is not persuasive, the rationale underlying this new position is of some interest.

It would appear to Respondents that the only plausable explanation for the Memorandum of the United States, which adopts *carte blanche* the arguments of Petitioner, irrespective of a multitude of prior inconsistencies which are a matter of record, is that for some reason the United States no longer views itself simply as a "friend of the court." It has truly assumed the role of an advocate in this type of litigation. In this respect, when one considers it is common knowledge in the Office of the Solicitor General that the only reason that the United States initially refused to lend its support to the Petition in the instant case centered around the strategical analysis that *DeCoteau* was too fresh in the mind of this Court and the fact situation in *Rosebud* too strong and too akin to *DeCoteau* — that as a result, *Rosebud* might well be "written off" in the interest of selecting a better uncertain-sum-in-trust case to support after a more appropriate lapse of time — such a conclusion is almost inescapable. Although the Order of this Court dated January 12, 1976, subsequently left the Office of the Solicitor General with little choice in the matter, at least insofar as taking some position was concerned, the basic facts remain acknowledged. The philosophy and persuasion that was eventually responsible for even convincing certain individuals in the Office that had continued to oppose this new role evidently bore fruit — as the document which is now submitted by the United States as a friend of the Court attests.

Apart from the fact that Respondents are understandably dissatisfied with the end result, although Respondents did not elect to participate in this process of persuading the Office of the Solicitor General one way or the other, the true significance of the entire sequence of events lies in the manner in which the Memorandum should now be viewed. Rather than continuing to clothe the United States with a

higher degree of objectivity than is ordinarily accorded *amicus curiae* participation, Respondents would submit that, in light of its new role, this Court should view its work product accordingly. With this point in mind, the specific arguments in the Memorandum can now be addressed.

II

THE NEW POSITION OF THE UNITED STATES IS IN CONFLICT WITH THE LANGUAGE, LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE THREE ROSEBUD ACTS.

In the initial Brief to this Court, it was stated that Respondents would not attempt, within the confines of a Brief in Opposition to the Petition, to once again set forth at length the language of the Rosebud documents that refute each and every argument in the Petition that was presented and rejected by the courts below. In this respect, Respondents relied solely on the opinions below. They set forth the essence of what this Court deemed controlling in *DeCoteau:* the language, legislative history and surrounding circumstances of the Act in question. *DeCoteau, supra* at 448. This documentation forms the crux of the position of Respondents.

As was the case with the Petition, Respondents would submit that in general there is nothing of substance in the Memorandum of the United States that was not presented by the United States and rejected below. For this reason, Respondents will adhere to the same basic format and again primarily rely on the persuasiveness of the opinions below, both of which set forth the substance of the documents as clearly and concisely as it was possible to do in a written opinion.

The Brief in Opposition did deal extensively with the fact that the language, legislative history and surrounding circumstances of the three Rosebud Acts fit squarely within the historical circumstances this Court set forth in *DeCoteau.* In *DeCoteau,* this Court made clear the continuity of congressional purpose evidenced by Section 5 of the General Allotment Act. If it were possible to reduce the new position of the United States to a sentence, Respondents believe that it could be fairly stated as follows: That since some point in time must mark a departure from a continued congressional policy of disestablishing reservations or portions thereof, and since *DeCoteau* makes clear that point in time cannot be the enactment of the General Allotment Act of 1887, then the subsequent adoption of the uncertain-sum-in-trust arrangement by Congress in 1902-1904 must, by implication, constitute this point in time. Apart from the documentation that effectively erodes this position presented in the Brief in Opposition and the opinions below, Respondents deem the following additional comments worthy of special notation.

A. THE UNCERTAIN-SUM-IN-TRUST ARRANGEMENT.

Respondents noted *supra* that at the outset, in the absence of additonal documentation, the United States has already substantially undermined the credibility of any new argument along these lines that it might advance in light of its position to the contrary that was briefed and argued in 1974 and 1975. If in 1974 and 1975 the United States viewed the General Allotment Act as the congressional thread of continuity that appears throughout certain surplus land statutes from 1887 to 1913, some new material or document must surface to substantiate a contrary position today. The mere fact that this Court in *DeCoteau* found the "familiar forces" exemplified by Section 5 of the General Allotment Act to be *opposite* to that urged by the United States in *DeCoteau* does not disturb the continuity of the format of the surplus land statutes in general. *DeCoteau, supra* at 432, 433, 434, 438, 441.

Significantly, the Memorandum is silent on the point. No new documentation or rationale is cited in support of the position that the uncertain-sum-in-trust arrangement was intended by Congress to alter the established policy of the Government noted in *DeCoteau*. In fact, the United States actually acknowledges the very crux of Respondents' argument — it cites with approval the opinion of the court below: "The problem 'was, simply put, money.' " M.U.S. at 2. In other words, the United States has conceded that all Congress did in *Rosebud* was balk at the thought of continuing to appropriate large sums of tax dollars to fund the 1901 Rosebud certain-sum-in-trust arrangement that was identical in all respects to the Act in *DeCoteau*.

In its stead, Congress formulated the uncertain-sum-in-trust method of which the 1904, 1907 and 1910 Rosebud Acts are representative. Congress did not intend this fact to alter its established policy and the United States cannot cite any congressional documentation in support of a position to the contrary. In light of the absence of even one contemporary document from any Rosebud source in the Memorandum to detract from the multitude of Congressional documentation that does evidence a continued Congressional policy of disestablishment, Respondents would submit that this general concession is decisive of the merits of the position of the United States.

Moreover, the position of the United States that the uncertain-sum-in-trust arrangement now constitutes the crux of the "crucial difference" between the Rosebud Acts and the certain-sum-in-trust Act construed in *DeCoteau* does not find support in the broad general provisions of Section 5 of the General Allotment Act of 1887 or Section 12 of the Rosebud Act of March 2, 1889, 25 Stat. 888. As Respondents pointed out in the Brief in Opposition at 18, because the original Rosebud Reservation was not delineated as such until the Act of March 2, 1889, certain provisions of the General

Allotment Act of 1887 were actually incorporated verbatim therein. As a result, Section 12 of the 1889 Rosebud Act, pursuant to which all Rosebud legislation was negotiated, amended and enacted, and Section 5 of the General Allotment Act of 1887, pursuant to which the Act construed in *DeCoteau* was negotiated, amended and enacted, are one and the same. Both provide that the only restriction on the manner of payment for the "purchase and release" of "such portions" of the "reservation not allotted" that the tribes were to "sell" was simply:

> Such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians. Act of February 8, 1887, Section 5, 24 Stat. 388; Act of March 2, 1889, Section 12, 25 Stat. 888.

Equally broad language was drafted to govern the terms of the eventual disposal of the certain portions of the reservation to the bona-fide settlers — namely, "such terms as Congress shall prescribe." February 8, 1887, Section 5, 24 Stat. 388; Act of March 2, 1889, Section 12, 25 State. 888. In both instances, here, as in *DeCoteau,* Congressional discretion was virtually unlimited. In terms of the statutory format for payment, the general prerequisites in *DeCoteau* and *Rosebud* are one and the same.

Even more significant in terms of the precise issue before the Court is the manner in which Congress, later in the same mutual provision, described the portion of the reservation so affected in relation to the eventual disposition of the proceeds:

> Purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians *to whom such reservation belonged.* Act of February 8, 1887, Section 5, 24 Stat. 388; Act of March 2, 1889, Section 12, 25 Stat. 888, (emphasis added).

In *DeCoteau* and in *Rosebud*, in their origin all of the Acts undermine rather than support the new position of the United States.

Secondly, in order to compensate for the lack of any congressional support actually evidencing a departure in congressional policy, the United States has seized upon the fact that an uncertain-sum-in-trust arrangement was also utilized in the two Acts construed in *Seymour* and *Mattz*. Armed with this superficial similarity, the United States reasons that since this Court held that the reservations affected in *Seymour* and *Mattz* remained intact, this Court must also find that Congress intended that the original Rosebud Reservation would remain intact.

Such an argument could only be persuasive if the Rosebud documents were devoid of substantial evidence of a congressional intent to the contrary. The opinions below attest that this is not the case. Like the Petitioner, the United States simply ignores the substance of this documentation. Initially, the Memorandum states:

> We recognize the force of the court of appeals' analysis and the substantial body of legislative and other materials marshalled in support of its decision that the Acts of 1904, 1907 and 1910 extinguish the disputed portions of the Rosebud Indian Reservation. Nevertheless, for the reasons set forth below, we disagree with the Court's conclusions about the effects of these statutes. . . . M.U.S. at 7.

The persuasiveness of the "reasons" for "disagreement" set forth thereafter is exemplified by the fact that the Memorandum neglected to squarely address any of the "materials marshalled in support" of either of the decisions below.

Respondents would submit that the reason for the failure on the part of the United States to squarely address any of

the statements in the House and Senate Reports and the *Congressional Record* by the sponsors of the Rosebud legislation, set forth and relied upon by the courts below, can only be that the same documentation is in such irreconcilable conflict with the carefully laid theory of the United States that it is susceptible of no other treatment. No degree of sophistication alone can weather a full exposure to the Rosebud documents. The courts below set forth this documentation and the manner in which the United States has replied is instructive.

Moreover, the superficial similarity argument also ignores that in general, the quest in *Seymour* and *Mattz* was for congressional intent. In *Seymour* and *Mattz*, the uncertain-sum-in-trust provision was but one of many other and more significant factors set forth in the opinions that *in toto* "militated persuasively against" a finding of disestablishment in the specific fact situations presented therein. *DeCoteau, supra* at 448. In light of this compelling distinction, there is no rule of statutory construction that calls for a uniformity of results. *DeCoteau* quelled this misconception. In this respect, the position of the United States is again strikingly similar to the arguments and briefs it submitted in support of a recognition of the existence of the original boundaries of the Lake Traverse Reservation in *DeCoteau*. Namely, a repeated plea for a blanket adherence to the end results of *Seymour* and *Mattz* in every case irrespective of the substantial body of evidence of a congressional intent to the contrary in the language, legislative history and surrounding circumstances of the particular act in question.

B. PERIPHERAL DOCUMENTATION.

Another related aspect of the Memorandum for the United States in the instant case that is even more reflective of the Memorandum and Brief submitted by the United States in *DeCoteau* is the type of peripheral documentation that is

specifically submitted in support of the conclusion of the United States that Congress intended that the original Rosebud Reservation would continue to exist as such. For the most part, this peripheral documentation consists of materials and arguments that were found not to be persuasive in *DeCoteau* either because they were unrelated to the issue of congressional intent before the Court or because they were not reliable indicia of congressional intent in a case where the record was replete with sufficient probative documentation to the contrary. In *Rosebud*, the same peripheral documentation is subject to the same deficiencies.

Within the confines of a Reply Brief, there is no reason for Respondents to separately address at length each example of this type of documentation presented in the Memorandum. The opinions below and the Briefs in Opposition adequately reflect the tenor of the Rosebud Acts and the Rosebud documents. Administratively, in their proper perspective, the two letters of the local school superintendent and the Interior employee from which the United States quotes at length, are probative of nothing. M.U.S. at 17-19.[1]

Even a cursory review of the *DeCoteau* briefs would reveal the fact that the same local field solicitor of the Bureau of Indian Affairs that in 1972 concluded that the Rosebud Acts did not disestablish any portion of the original Rosebud Reservation (M.U.S. at 21), also reached the same conclusion in another 1972 opinion directed to the original Lake Traverse Reservation. M.U.S. at 25 (U.S.S.C., 1974). Similarly, when one considers the 3,000 pages of Rosebud documents from which the "surrounding circumstances" of the Rosebud Acts could have been reconstructed, the fact that the United States was forced to rely solely on two paragraphs of

[1] *See*, M.U.S. at 22-23 (U.S.S.C., 1974) where the United States in *DeCoteau* presented similar "evidence" in support of an administrative recognition which "confirmed" that the *DeCoteau* Act did not disestablish the Lake Traverse Reservation.

questionable debate from another Act for support speaks for itself. M.U.S. at 16. Therefore, the remainder of this Reply Brief will be addressed only to the two detailed arguments presented by the United States yet to be discussed.

1. The Diminished Reservation Argument. The diminished reservation argument of the United States is listed foremost as one of the reasons the United States disagrees with the conclusions below. M.U.S. at 7, 12. According to the United States, the proper construction of the term diminished reservation is simply a "reduction of the amount of land owned by Indians within the Reservation boundaries." M.U.S. at 7. For this reason, the term does not denote a corresponding reduction of reservation boundaries.

Respondents would initially point out that this same argument has been repeatedly briefed and rejected in the instant case. In addition to the "numerous statements in Committee Reports and on the floors of both Houses of Congress that the Acts had the effect of diminishing the Reservation" to which the United States simply refers to at 12 as "*statements* which the court below relied upon," the 1910 Rosebud Act *on its face* states:

> That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish the same and select allotments in lieu thereof on the *diminished* reservation. Act of May 30, 1910, 36 Stat. 443 (emphasis added).

Thus, the significant role that the proper construction of the term plays in the Rosebud documents is beyond question.

The court below addressed the diminished reservation argument, then advanced by Petitioner, in the following terms:

> Whatever question there may be as to the proper interpretation of "diminished," that is, whether it

> means diminution by the carving out of a described area with concomitant change of boundaries, or a diminution by sale of lots to non-Indians without changing the boundaries, upon the facts before us *it is clear that the parties contemplated a carving out process.* Such descriptions of the effect of the negotiations, found in both pre-agreement and post-agreement materials as we cited above are persuasive as to intent. *Rosebud, supra* at 99 (emphasis added).

In this respect, as in all others, Respondents would submit that the conclusion of the court is clearly correct.

The Brief for the State of North Dakota, et al., as *amicus curiae* in Opposition in a related case where a Petition for Certiorari has also been filed and a similar argument presented, adds credence to the opinion of the court below in this respect.[4] In *DeCoteau,* as North Dakota noted, this Court used "diminished reservation" in a sense that involved a necessary and corresponding adjustment of reservation boundaries.

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, *undiminished,* but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. 1151(c). See *United States v. Pelican,* 232 U.S. 442. With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have *carved out a diminished reservation,* instead of or in addition to the retained allotments. *DeCoteau, supra* at 446-447.

[4] *United States ex rel. Cook v. Parkinson, et al.*, 525 F.2d 120 (C.A. 8, 1975), No. 75-5867. In all, eleven separate states, by their Attorneys' General have joined the State of North Dakota in support of the position of Respondents in Opposition to the Petition in *Cook* and the Petition in the instant case. Briefs for the State of North Dakota et al., in Opposition, Nos. 75-562, 75-5867.

Historically, it is not surprising that in *DeCoteau,* "diminished reservation" was used to describe only those situations where diminished reservation meant diminished reservation boundaries. In terms of the decisions of this Court, this is the same construction that has consistenly been attributed to the term at least as far back as 1914 when this Court decided *United States v. Pelican,* 232 U.S. 442 (1914):

> The same considerations, in substance, apply to the allotted lands which, when the *reservation was diminished,* were excepted from the portion restored to the public domain. *Pelican, supra* at 445 (emphasis added).

In fact, as recently as 1962, this Court again attributed the same construction to the term in the same case that the United States has now cited in support of an alternative construction: *Seymour v. Superintendent,* 368 U.S. 351 (1962). M.U.S. at 12.

In *Seymour,* this Court was presented with another issue involving the same reservation that was discussed in *Pelican.* In relating the historical background of the Colville Reservation Justice Black succinctly stated:

> In 1892, the *size of this reservation was diminished* when Congress passed an act . . . This Act did not, however, purport to affect the status of the *remaining part of the reservation, since known as the 'South Half' or the 'diminished Colville Indian Reservation'* . . . . *Seymour, supra* at 354 (emphasis added).

In light of the specific holding of *Seymour*, there can be no doubt that diminished reservation also meant diminished reservation boundaries. If *Seymour* supports the construction of the term now advanced by the United States, that support certainly is not apparent in the opinion. *See*, M.U.S. at 12.

Secondly, as North Dakota also noted, there is the basic rule in Federal Indian Law, that terms of this nature should be construed in a non-technical sense. In short, they should be given their plain and ordinary meaning. In his *Handbook of Federal Indian Law*, the acknowledged expert in Federal Indian Law, Felix S. Cohen, based a similar conclusion on a number of decisions from this Court.

> A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful causes are resolved in a *non-technical way* as the Indians would have understood the language. Cohen, Felix S., *Handbook of Federal Indian Law*, at 37 (University of New Mexico Press).

Thus, the argument of the United States not only ignores the manner in which the term diminished reservation has been traditionally used by this Court, but it is also contrary to one of the most basic tenets in this area of the law.

Even more significant, however, is the fact that in addition to the foregoing reasons for the court below to reject the tendered construction of the United States, the Rosebud documents themselves contain evidence that conclusively establishes that in the Rosebud situation diminished reservation could only have meant diminished reservation boundaries. The opinion below specifically addresses this material in three separate instances. Nevertheless, the Memorandum of the United States refuses to even acknowledge the substance of the citations. *Rosebud, supra* at 99-100, 110-111,

111-112. In essence, the court noted therein that retrospectively, with the passage of each Rosebud Act, the remaining or diminished Rosebud Reservation was succinctly described in terms of decreasing acreage figures that necessarily excluded the entire acreage of the portion of the reservation previously affected — unallotted and allotted land alike. For example, prior to the 1910 Act, the House Report stated:

> There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910).

As a result, after the passage of the 1910 Act, the diminished reservation was specifically stated to contain the precise acreage lying within the boundaries of Todd County. Thus, in addition to the "former reservation" and "heretofore a part of the reservation" terminology which was contemporaneously used in later Rosebud statutes to describe the area affected, the Rosebud documents do contain the basis for the proper construction of the term diminished Rosebud Reservation.[5]

Moreover, the Todd County documents set forth in detail in the Brief in Opposition at 32-35 unequivocally confirm this fact:

> Inspector McLaughlin. I fully appreciate your feelings on this matter, knowing that *your reservation* which was a very large one a few years ago is *now reduced to the limits of Todd County*, . . . R. A. App. III, Doc. 37 at 14-15 (emphasis added).
>
> *The diminished reservation of the Rosebud Indians is now embraced in Todd County*, South Dakota . . . In the past eight years the Rosebud Indians have

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[5] *See*, A. App. II, Doc. No. 2 at 2, 3, wherein the Commissioner of Indian Affairs also explained "diminished" in unequivocal terms.

consented to the opening of fully three-fourths of their original reservation, that is, Gregory County in 1904, Tripp County in 1909, and Mellette County, recently appraised and registered for and opened to entry April first next. *With the diminished reservation of the Rosebud Indians being now only one-fourth of this area eight years ago* . . . While the Rosebud Indians, whose reservation adjoins the Pine Ridge Indian Reservation on the east, have had their reservation *diminished* in the past eight years to *one-fourth of its original area.* They [the Rosebud Indians] *having so commendably consented to each of the three cessions of their reservation in the past eight years.* R. A. App. III, Doc. 38 at 4, 5, 6 (emphasis added).

The Secretary of the Interior. For the information of your committee, however, it may be pointed out that by successive openings within the past few years *this reservation has been successively reduced to less than one-fourth of its original area.* Gregory County was opened in 1904 under the provisions of the Act of April 23, 1904, (33 Stat. L. 254), Tripp County, in 1908,under the act of March 2, 1907, (34 Stat. L. 1230); and Mellette County will be opened during the present year under the act of May 30, 1910 (36 Stat. L. 448), the President's proclamation therefor having been issued on June 29, 1911.

It may be said that upward of 7,000 Indians within this reservation have previously been allotted approximately 1,679,000 acres of land, of which 636,-300 acres fall *within Todd County — the diminished reservation.* R. A. App. III, Doc. 39 at 4 (emphasis added).

By successive openings within the past few years their reservation has been reduced to less than one-fourth of its original area. This leaves within the diminished reservation at this time the lands in Todd County only. Letter from the Secretary of the Interior to Senator Gamble (emphasis added).

In this light, it is not difficult to understand the rationale of the court below on this point. The only additional authority

other than a request for a "recognition of the obvious" (M.U.S. at 12) that the United States has offered this Court to support an alternative construction is a citation to *Seymour* which, on its face, would lead one to the opposite conclusion. In *Mattz,* this Court did not use the term diminished reservation or address the question. M.U.S. at 12.

In short, the alternative construction of diminished reservation now offered by the United States is not persuasive. Even the United States must recognize this fact to a certain extent. Consistently inconsistent, in 1973, the United States supported the position of the Respondents — diminished reservation meant diminished reservation boundaries. Brief of United States, *Amicus Curiae* at 4-7, *United States ex rel. Condon v. Erickson,* 478 F.2d 684 (C.A. 8, 1973).[6]

2. The 1934 Indian Reorganization Act. Another major argument that the United States advances as a reason for its disagreement with the conclusion of the court below is founded on a 1934 Departmental Opinion issued pursuant to the 1934 Indian Reorganization Act. Act of June 18, 1934, (48 Stat. 984), 54 I.D. 559 (1934), M.U.S. at 8, 19-21. Apart from the fact that the Departmental Opinion is based upon a congressional enactment 24 years removed from the language, legislative history and surrounding circumstances of the last Rosebud Act in question (the 1934 Indian Reorganization Act), at a time when it is acknowledged that the philosophy of Congress was no longer in accord with the philosophy of Section 5 of the General Allotment Act of 1887 and the special surplus land statutes enacted pursuant thereto, there are other and more significant reasons why Respondents cannot share the United States' view of the Opinion.

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[6] Although the construction of the term was not in issue in *DeCoteau,* because the Act in *DeCoteau* affected the entire reservation, it is significant that, at the time of the briefing, even the United States consistently used the term diminished reservation in the context of diminished reservation boundaries. For example, see B.U.S. at 16, 27, set forth *supra* at 6, 7.

In the first place, a fair reading of the Opinion most certainly does not support the bald assertion of the United States that in 1934 the Department "decided in a formal opinion (54 I.D. 559) that this type of statute does not terminate the reservation status." M.U.S. at 8. The purpose of the Opinion, as stated in the Opinion, was simply to respond to a general directive in the 1934 Indian Reorganization Act to temporarily withdraw certain "remaining surplus lands of any Indian reservation *heretofore* opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States" from further disposition by public entry, sale or otherwise. Act of June 18, 1934, *supra* (emphasis added). The temporary withdrawal was necessary to insure that restoration to tribal ownership at a later date would at least be possible. 54 I.D. at 561 (1934).

In the Opinion, a decision was made to include within the withdrawal only those lands "the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians." 54 I.D. at 563 (1934). In other words, the withdrawal was to be limited to those remaining surplus lands of reservations heretofore opened only by surplus land statutes in which the manner of payment was provided for in the uncertain-sum-in-trust arrangement. The basis for this distinction is also stated in the Opinion.

> It can safely be said that it would not be *to the interest of the public* to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, [*DeCoteau*] because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation. 54 I.D. 559, 560 (1934).

Thus, the aspect of the uncertain-sum-in-trust arrangement in issue here clearly did not play any part in the decision. But for the "interest of the public," the Opinion could have included the remaining surplus lands of any reservation heretofore opened that had ever been created in the United States including the original Lake Traverse Reservation in issue in *DeCoteau*.

In this respect, as this Court noted in a similar situation at oral argument in *DeCoteau*, it would be begging the question to argue that any reservation included in a list of "reservations heretofore opened" must necessarily exist as originally defined. The proper construction of the term "opened" in the *Rosebud* context is just as much at issue here as it was in *DeCoteau*.[7]

Secondly, although Respondents are clearly not in a position to verify the current and accepted jurisdictional history of each of the thirty statutes listed in the Opinion, certain other deficiencies in the position of the United States are also readily apparent. For example, included in the list in the Opinion is the Uintah and Ouray Reservation and the Act of March 27, 1902, 32 Stat. 263. This Act, which placed the Uintah and Ouray Reservation in the "heretofore opened" reservation status *on its face* directed that "all the unallotted lands within said reservation *shall be restored to the public domain.*" Act, *supra* (emphasis added). *Mattz*, *supra* at 504, N. 22. The language and the jurisdictional history of other "heretofore opened" reservations in the same list in Colorado, South Dakota, and Wyoming are equally clear. In 1934, at least certain of these remaining surplus lands were not then within the present boundaries of any reservation. At the same time, the opposite might be true in other instances listed

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[7] The documents set forth in the *DeCoteau* opinion repeatedly refer to the Act of disestablishment in *DeCoteau* simply as "the opening of the reservation." *DeCoteau*, *supra* at 431, 434, 440, 441, 442.

therein, but this is not the point. As reliable indicia of the issue presented, the 1934 Indian Reorganization Act and the Departmental Opinion issued pursuant thereto will not suffice. Significantly, in a subsequent opinion which the Memorandum neglected to cite, the Department *formally* confirmed this fact. 56 I.D. 30 (1938).

Four years after the Department issued the temporary withdrawal opinion, the Secretary of Interior, at the instance of the Commissioner of Indian Affairs, requested a more formal opinion on the status of the remaining surplus lands of the "heretofore opened" Ute Reservation ceded in 1880 which was also included in the initial list. In this opinion, the Acting Solicitor laid bare the current position of the United States:

> In my judgment, even if the reservation of the Confederated Bands of Utes were held no longer to exist, that fact alone would not negative the application of section 3 of the Indian Reorganization Act to the remaining undisposed of lands of that reservation. The phrase "of any Indian reservation" must be used in section 3 to describe the character and location of the lands *at the time they were opened* to disposal under the public land laws. The lands which may be restored to tribal ownership must be lands which were part of any Indian reservation, not of any forest or military reservation or of any other class of lands. Section 3 cannot mean that the lands must *now* have the character of Indian reservation lands, *as they are not reservation lands* but lands capable of being restored to reservation status under the Indian Reorganization Act. *Nor can section 3 mean that the lands must be located within the geographical limits of an Indian reservation.* 56 I.D. 330, 333 (1938) (emphasis added).

Therefore, in 1938 even the Department made clear that neither the 1934 Indian Reorganization Act nor any of the restoration orders issued pursuant to it had anything to do

with reservation boundaries *per se* or the issue that is now before this Court in the instant case.

The United States has not cited and Respondents are not aware of any specific restoration order for the area affected by the Rosebud Acts in issue. In light of the 1938 Opinion, however, no one would have been surprised had such a Rosebud order addressed a Rosebud restoration in the same terms that another order affecting another "heretofore opened" reservation in South Dakota, which was also included in the initial 1934 list, did address a subsequent restoration:

> NOW, THEREFORE, by virtue of the authority vested in the Secretary of the Interior by Sections 3 and 7 of the Act of June 18, 1934 (48 Stat. 984), I hereby find that restoration to tribal ownership of all lands which are now, or may hereafter be, classified as undisposed-of surplus opened lands within the area above described, being within the *boundaries of the former Cheyenne River Reservation*, will be in public interst, and they are hereby restored to tribal ownership for the use and benefit of the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, and the same are added to and made a part of the existing Reservation, subject to any valid existing rights. Restoration Order of Oscar L. Chapman, Assistant Secretary of the Interior, June 12, 1941 (emphasis added).

In short, the argument of the United States that the 1934 Opinion can constitute a valid basis upon which to question the conclusions of the courts below is not persuasive.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

William J. Janklow
Attorney General for South Dakota

William F. Day, Jr.
Attorney for the Four Counties

Tom D. Tobin
Special Assistant Attorney General

Attorneys for Respondents

May, 1976